

## **Agreement between the Government of Australia and the Government of New Zealand relating to Air Services**

- 6.1 The purpose of the Agreement between the Government of Australia and the Government of New Zealand relating to Air Services, done at Auckland on 8 August 2002, is to allow direct air services between Australia and New Zealand to facilitate trade and tourism. This is the first agreement of its type and is in keeping with the principles of the *Australia-New Zealand Closer Economic Relations Trade Agreement* and the *Australia-New Zealand Single Aviation Market Arrangements (SAM)* which entered into force on 1 January 1983 and 1 November 1996 respectively.<sup>1</sup> The Committee was advised that the SAM arrangements were less than treaty status, but that all former and new arrangements are combined in this Agreement.<sup>2</sup>
- 6.2 The Agreement obligates each party to allow the designated airlines of the other country *and* SAM carriers to operate scheduled air services carrying passengers and cargo between the two countries on specified routes. It includes reciprocal provisions on a range of aviation-related matters such as safety, security, customs regulation, and the commercial aspects of airline operations, including the establishment of offices and sale of fares in the territory of the other party. The Committee considered the above provisions and the implications of 'open skies' agreements and the SAM arrangements.
- 6.3 The Committee was advised that the Australian Government identified Singapore, the United States and the United Kingdom as high-priority

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1 Information about the proposed treaty action is taken from the National Interest Analysis, tabled in conjunction with the treaty text on 27 August 2002, and a public hearing held in Canberra on 23 September 2002.

2 A. Parle, *Transcript of Evidence*, p.26.

targets to negotiate future open skies agreements. The open skies agreement is a liberal agreement; the Committee was advised that virtually all the barriers that pertain to the normal bilateral treaties have been removed. The Committee understands that the agreement will confirm the existing liberal aviation rights between the two countries (as in the SAM arrangements) as well as remove some of the remaining restrictions in the aviation arrangements between Australia and New Zealand. The Agreement also allows tariffs for air transportation to be established by each designated airline or SAM carrier, based upon commercial considerations in the marketplace, rather than requiring government approval.

- 6.4 The unique SAM arrangements between Australia and New Zealand provide New Zealand owned airlines, as the only foreign international airlines, with the ability to operate on Australian domestic routes. Australian carriers also have the right to operate domestic routes between points in New Zealand. Under the new Agreement, the Committee was advised that the requirement that a country's designated airlines be controlled by nationals of that country will be retained, however the requirement that a designated airline of a country be owned by nationals of that country has been removed.
- 6.5 The Committee understands that fifth freedom rights allow an international airline to operate from one country to the other and then continue to a further country, and historically, there have been restrictions on the provision of services according to these rights (see Table 1, opposite). The Committee notes the new development in this Agreement, which removes such restrictions to provide fifth freedom services, meaning that services no longer have to start and finish in the country of designation. The Committee heard that, for example, under the new Agreement, New Zealand carriers can now operate services originating in the United States through points in New Zealand and Australia and beyond points in South-East Asia without restriction, assuming that they hold the necessary rights with these third countries.<sup>3</sup>
- 6.6 In addition, the Committee understands that pure freight carriers under these arrangements are granted seventh freedom rights, which allow cargo airlines in one country to base aircraft in another country and to operate to a third country. Seventh freedom rights differ from fifth freedom rights as an airline does not have to start its journey in the country where designations took place.

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3 A. Parle, *Transcript of Evidence*, p.26.

**Table 2 International Aviation Rights of Passage (Commonly known as 'Freedoms')**

First Freedom*	The right of an airline of one country to fly over the territory of another country without landing.
Second Freedom*	The right of an airline of one country to land in another country for non traffic reasons, such as maintenance or refuelling, while en route to another country.
<i>*These freedoms are referred to as technical rights. Some 100 countries are contracting parties to the 'International Air Services Transit Agreement' which provides multilateral approval of these technical rights.</i>	
Third freedom**	The right of an airline of one country to carry traffic (passengers, mail, cargo) <b>to</b> another country.
Fourth freedom**	The right of an airline of one country to carry traffic <b>from</b> another country to its own country.
Fifth freedom**	The right of an airline of one country to carry traffic between two foreign countries as long as the flight originates and terminates in its own country.
<i>** These rights are granted as rights in bilateral air services agreements.</i>	
<b>There are a number of other 'freedoms' which, although not officially recognised by the Chicago Convention or granted in bilateral air services agreements, are referred to and taken into account in bilateral negotiations (in particular the sixth freedom).</b>	
Sixth freedom	The right of an airline of one country to carry traffic between two foreign countries via its own country.
Seventh freedom	The right of an airline of one country to carry traffic on stand alone services between two other countries.
Eighth freedom or Cabotage	The right of an airline of one country to carry domestic traffic between two points within the territory of another country. Also known as cabotage, this right is rarely granted to foreign airlines, although this may change in a single aviation block comprised of a number of countries (e.g. the European Union).

Source *International Relations Branch, Aviation Policy Division, Department of Transport and Regional Services*

6.7 The Committee was advised that the Agreement also includes provisions that will remove secondary barriers within the SAM for the airlines of each country. This is achieved through the Australian and New Zealand governments agreeing that their domestic competition laws will apply to ensure fair regimes for airport access through slot management and non-discriminatory and fair pricing of aviation related user charges. The Australian Government has stated that the Agreement provides for competition authorities responsible for administering the competition laws in Australia and New Zealand to assist each other in investigations and enforcement actions in relation to competition policy.<sup>4</sup>

4 A Parle, *Transcript of Evidence*, pp.13-14.

- 6.8 Another new feature of this Agreement is that benefits will apply to non-scheduled or charter operations. As a result, the aeronautical authorities of both Australia and New Zealand will adopt a liberal approach in respect of non-scheduled operations consistent with the traffic rights exchanged under the agreement. The Committee viewed the extension of the Agreement to include non-scheduled carriers as a positive feature for Australian charter operators to be able to make decisions about whether they serve secondary gateways or establish services between Australia and New Zealand. The Committee accepts that there would be very few bilateral treaties that contained reference to non-scheduled operations.
- 6.9 To facilitate air services between the countries, the Agreement also includes standard reciprocal provisions on a range of other aviation related matters such as safety, aviation security, customs regulation and the commercial aspects of airline operations, including the ability to establish offices in the territory of the other party and to sell fares to the public. Under Article 6, both Parties are required to protect the security of civil aviation against acts of unlawful interference and, in particular, to act in conformity with multilateral conventions relating to aviation security.

## Designated airlines

- 6.10 The Committee raised concerns about the significance of designation of airlines under the Agreement. Despite the term 'open skies', the central issue of ownership and control remains.
- 6.11 The Committee was informed that designation comes about by, for example, a New Zealand carrier having its principal place of business in New Zealand and being controlled by the nationals of that country.<sup>5</sup> This Agreement will always be unusual because of the existence of both designated and single aviation market airlines. The Committee was advised that SAM airlines can be 50 per cent owned by either New Zealand or Australian nationals, but the chairman of the board must be either a New Zealand or Australian national and there must be a majority of either New Zealanders or Australians on that board. SAM carriers have permission to operate domestically within Australia or domestically within New Zealand. 'Designated' carriers can only operate internationally between Australia and New Zealand and beyond, or via other points.<sup>6</sup>
- 6.12 The Committee was advised that it is in Australia's interest to focus only on principal places of business as being the test for designation, but that not all potential treaty signatories would have the same focus. The

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5 A. Parle, *Transcript of Evidence*, p. 15.

6 A. Parle, *Transcript of Evidence*, p. 15.

Committee understands that should there be a concern raised under the terms of the treaty, negotiations would be held between the governments. There is also a dispute settlement procedure within this agreement.

- 6.13 The Committee is concerned that the issue of designation is still very much one for governments to decide, which could possibly lead to behaviour that could stifle competition and not be in the spirit of the treaty.
- 6.14 The Committee was advised that issues of 'ownership' and 'control' in the context of airlines have been pursued by the Australian Government in a number of fora around the globe. The Committee was informed that the Government view is that removing impediments to foreign investment would be an effective way of ensuring that carriers have profitable and viable operations.<sup>7</sup>
- 6.15 The Committee identified a potential contradiction between the increasing freedoms on the provisions of air services between Australia and New Zealand and the ongoing formality of passport and visa requirements for travel between the two countries. The views of Department of Foreign Affairs officials were sought but to date no response has been received.

## Recommendation 7

**The Committee recognises that responses to questions on notice must receive Ministerial approval prior to their release.**

**The Committee recommends that the Department of Foreign Affairs and Trade ensures that these measures do not inhibit its ability to provide requested information to the Committee within an acceptable timeframe.**

- 6.16 The Committee was advised that no amendments to legislation are required for the implementation of the Agreements, and there were no anticipated direct financial costs to the Australian Government. The Committee was also advised that of the wide consultation that was undertaken (such as relevant government departments, the International Air Services Commission, State government tourism authorities, tourism industry bodies, Australian international airports, and Qantas Airways Ltd), all major stakeholders supported the Agreement.

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<sup>7</sup> A. Parle, *Transcript of Evidence*, p.19.

- 6.17 The Committee understands that information on the Agreement has been provided to the States and Territories through the Commonwealth-State-Territory Standing Committee on Treaties and that the results of the consultations have all been supportive of taking binding treaty action.

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**Recommendation 8**

**The Committee agrees that by facilitating the development of the single aviation market between the two countries, the Agreement will promote benefits for inbound tourism, freight operations and greater air travel options for Australian consumers, and recommends that binding treaty action be taken.**